No. 89-478

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF MARYLAND

Petitioner,

v.

SANDRA ANN CRAIG

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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Question Presented

THE MARYLAND COURT OF APPEALS OF MARYLAND DECIDED *CRAIG V. MARYLAND* SOLELY ON STATE GROUND PRECLUDING *CERTIORARI* REVIEW.

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The Respondent, by her attorneys Maria Cristina Gutierrez, William H. Murphy, Jr., Gary S. Bernstein and Frederick P. Charleston, request that the Petition for Writ of Certiorari to the Court of Appeals of Maryland be denied.

STATEMENT OF THE CASE

The basic facts are set forth in the Petition for Writ of Certiorari to the Court of Appeals filed by the Petitioner, State of Maryland, and in the opinions of the Court of Appeals and Court of Special Appeals included in the appendix to the Petition.

REASONS FOR DENYING THE WRIT

THE COURT OF APPEALS OF MARYLAND DECIDED *CRAIG v. MARYLAND* SOLELY ON STATE GROUNDS PRECLUDING CERTIORARI REVIEW.

This Court has expressly held that it will not undertake to review a state court decision which indicates clearly and expressly that it is alternatively based on *bona fide* separate, adequate and independent grounds. *Michigan v. Long*, 463 U.S. 1032 (1983). For state courts must be left free and unfettered in interpreting their state constitutions and laws. *Minnesota v. National Tea Co.*, 309 U.S. 551 (1940).

The Court of Appeals of Maryland's decision in *Craig v. State*, 316 Md. 551, 560 A.2d 1120 (1989) rests separately adequately and independently on state grounds. *Craig* held solely as a matter of state law that the Maryland Annotated Code, Courts and Judicial Proceedings Article 1, §9-102 (hereinafter cited as CJP §9-102) required that the trial judge personally observe and examine the child witness and make a case-specific finding of necessity before utilizing the less than full confrontation procedures authorized under the statute. That the Court of Appeals decided this case exclusively on state grounds is abundantly clear from its holding.

Petitioner urges this Court to overrule the Court of Appeals of Maryland on the specious ground that the reversal of Mrs. Craig's conviction is based on a misinterpretation of *Coy v. Iowa*, 487 U.S.___, 108 S.Ct. 2798 (1989). The fallacy of Petitioner's argument is demonstrated by careful review of the history and facts of this case. CJP §9-102, was first reviewed by the Court of Appeals in *Wildermuth v. State* 310 Md. 496, 530 A.2d 275 (1987) which upheld the facial constitutionality of the statute in the face of a similar confrontational attack.

Wildermuth delineated guidelines for trial judges in establishing the quantum of evidence required before CJP §9-102 could be invoked and held that, *inter alia*, ordinarily a trial judge should examine, and observe a child witness before utilizing CJP §9-102. Mrs. Craig was convicted on the testimony of four children who were permitted over her objections to testify from the judge's chambers, out of Mrs. Craig's physical presence, on one-way closed-circuit television which permitted Mrs. Craig to see each child but prevented the children from seeing Mrs. Craig. This procedure was invoked under CJP §9-102.

Mrs. Craig challenged her conviction on numerous grounds including a three-pronged attack on CJP §9-102. First, she argued that CJP §9-102 violated the Sixth Amendment by preventing an accused from subjecting an untruthful child to "serious emotional distress" which would render the child "unable to reasonably communicate" a false accusation. Second, she argued that because CJP §9-102 eliminated the right to face-to-face confrontation altogether it violated the Sixth Amendment. Third, she argued that because *Wildermuth* requires a trial judge to personally examine each of the children and observe their behavior before invoking CJP §9-102 and because the trial judge did not do so in her case, her conviction should be reversed because the trial judge violated CJP §9-102 as interpreted by *Wildermuth*.

Petitioner conveniently omits from its argument the fact that the Court of Appeals of Maryland expressly rejected[1] Mrs. Craig's constitutional attacks on CJP §9-102. It reversed her conviction because the trial judge failed to question each child or observe their behavior on the witness stand before invoking the

[1] Before rejecting Mrs. Craig's constitutional attack, the Court of Appeals meticulously digested *Coy* both through the majority opinions view that the Sixth Amendment right of confrontation *ordinarily* demands a face-to-face encounter between accused and accuser and then through Justice O'Connor's concurring view that the right was not absolute but "rather may give way in an appropriate case to other competing interests so as to permit the use of certain procedural devices designed to shield a child witness from the trauma of courtroom testimony" *Coy* 487 U.S. at ____, 108 S.Ct. at 2803. The Court found nothing in *Coy* to cause it to reevaluate *Wildermuth's* finding that CJP §9-102 was constitutional under state law.

CJP §9-102 procedures which took away all of Mrs. Craig's confrontation rights. The entire holding of the Court of Appeals is as follows:

> "The steps taken in the trial court, in this case, to invoke the protection of §9-102 did not comply with the requirements we have set forth in Part III of this opinion. Four children testified via one-way closed-circuit television. Their ages ranged from four to seven. Two were girls and two were boys. When the trial judge made his §9-102 determination, the finding that authorized the use of closed-circuit television, he had the benefit only of expert testimony on the ability of the children to communicate; he did not question any of the children himself, nor did he observe any child's behavior on the witness stand before making his ruling. He did not explore any alternatives to the use of one-way closed-circuit television.
>
> In the absence of judicial observation of the witnesses and careful exploration of alternatives to full confrontation, beginning with those least restrictive of the right, the testimony before the court was insufficient to support the use of §9-102. The expert testimony in each case suggested that each child would have some or considerable difficulty in testifying in Craig's presence. For example, as to one child, the expert said what 'would cause him the most anxiety would be to testify in front of Mrs. Craig . . . .' The child 'wouldn't be able to communicate effectively.' As to another, an expert said she 'would probably stop talking and she would withdraw and curl up.' With respect to two others, the testimony was that one would 'become highly agitated, that he may refuse to talk or if he did talk, that he would choose his subject regardless of the questions' while the other would 'become extremely timid and unwilling to talk.'
>
> We need not debate whether under some circumstances this sort of evidence might help to support a finding that a child, if he or she testified in the defendant's presence, would suffer 'serious emotional distress such that the child cannot reasonably communicate.' We do point out that in Wildermuth, we said that 'testimony about the likely impact on the particular child must be specific and must show more than mere nervousness or excitement or some reluctance to testify.' 310 Md. at 514, 530 A.2d at 289. Even more critical, 'there must be 'a particularized examination of all the circumstances concerning the impact of public testimony in the presence of the defendant upon the emotional health of the child.' ' Id. at 525, 530 A.2d at 289 (quoting People v. Algarin, 129 Misc. 2d 1016, 1024, 498 N.Y.S.2d 977, 983 (N.Y. Sup. Ct. 1986)) [emphasis supplied].
>
> The difficulty here is that the testimony in this case was not sharply focused on the effect of the defendant's presence on the child witnesses. For example, as to one witness, the expert thought the child 'coming into the courtroom where she would be faced with the alleged perpetrator and a courtroom of strangers would be unable to talk about what happened to her.' [Emphasis

supplied]. As to another: 'he would have great difficulty in talking in front of people, particularly in front of Mrs. Craig . . . . ' [Emphasis supplied]. With respect to the third child, this dialogue occurred:

> Q. What do you think the reaction of Jessie . . . would be if brought into the courtroom to testify?
>
> A. I [think] that she would probably -- Jessie would probably look around and become extremely timid and unwilling to talk. [Emphasis supplied].

When the constitutional right of confrontation is at issue, we repeat, the necessity that may be invoked to diminish that right, through procedures such as those permitted by §9-102, must be related to testimony in the defendant's presence: It is not enough, for this purpose, that trauma or inability to testify be produced by testifying in the courtroom or in front of people. There may be other ways of dealing with that sort of problem, see note 9, supra, but limitation of the right of confrontation is not one of them.

Whether the trial judge might have narrowed the generality of this testimony, had he questioned the potential witnesses, we cannot tell. He did not question them: he did not have before him out declaration 'personal observation [and inquire] by the judge . . . should be the rule rather than the exception.' Wildermuth, 310 Md. at 523-524, 530 A.2d at 289.

Unable to supplement the expert testimony by responses to questions put by him, or by his own observations of the children's behavior in Craig's presence, the judge made his §9-102 finding in terms of what the experts had said. He ruled that 'the testimony of each of these children in a courtroom will [result] in each child suffering serious emotional distress . . . such that each of these children cannot reasonably communicate.' He failed to find -- indeed, on the evidence before him, could not have found -- that this result would be the product of testimony in a courtroom in the defendant's presence or outside the courtroom but in the defendant's televised presence. That, however, is the finding of necessity required to limit the defendant's right of confrontation through invocation of §9-102. Since that finding was not made here, and since the procedures we deem requisite to the valid use of §9-102 were not followed, the judgment of the Court of Special Appeals must be reversed and the case remanded for a new trial." *Craig*, 560 A.2d at 111.

As its holding makes clear, the Court of Appeals analyzed *Coy* only to refute Mrs. Craig's contention that CJP §9-102 was unconstitutional, which neither the Petitioner nor Mrs. Craig now contest because her convictions were nonetheless reversed on state law grounds, and only to establish the proposition that before invoking CJP §9-102 the trial judge was obliged under the Sixth Amendment to carefully explore "alternatives to full confrontation, beginning with those least restrictive of the right before denying Mrs. Craig her

right to see and be seen by the child. Although that analysis was correct, it was not essential to the court's finding that the trial judge failed to comply with *Wildermuth's* predicate requirements for invocation of CJP §9-102.

Indeed, that part of the opinion was dictum, written to guide Maryland trial judges when asked by the state to abridge an accused's Sixth Amendment right to see and be seen by a child witness every time invocation of CJP §9-102's protective procedures are sought. The court made it clear that when each such request is made, a trial judge must be sensitive to confrontation clause requirements in fashioning alternatives to full confrontational rights. The Court of Appeals said that where a finding is made that a child witness is unable to reasonable communicate because of serious emotional distress produced by the *presence* of the defendant then:

> ". . . appropriate protective measures must then be tailored to limit the confrontation right as little as feasible. Section 9-102, read in the light of Coy, cannot be the exclusive means of witness protection. It is, rather the ultimate -- the farthest a court can go in that direction, Thus, for example, if a child witness will not suffer 'severe emotional distress' when testifying via two-way television in a room separate from the courtroom, so that the accused is visible to the witness as well as vice versa, that procedure should be followed." *Craig*, 560 A.2d at 1128.

The Court of Appeals has thus instructed trial judges to invoke CJP §9-102 only when necessary, hardly a proposition which should interest this Court.

Because Mrs. Craig's conviction was reversed only because the trial judge failed to meet this standard before invoking CJP §9-102; because this was purely a state law question; because *Coy* was analyzed by the Court of Appeals only to reject Mrs. Craig's constitutional attack; and because Mrs. Craig in light of the reversal of her conviction is not now pressing such an attack, the Petition for *Certiorari* should be denied.

Petitioner's real complaint here is that, as a matter of state law, the Court of Appeals of Maryland in reaffirming its prior decision in *Wildermuth* has continued to require that the protections of the statute "cannot be invoked

unless the child witness initially is questioned . . . *in the defendant's presence*." *Craig*, 560 A.2d at 1127. However, because this is a requirement of state law and not the Court of Appeals' interpretation of what *Coy* requires, and because the relief sought is specious, Petitioner must address its complaint to the legislature of Maryland and not to this Court. This Court should not permit the use of a subterfuge of constitutional argument to persuade this Court to overturn a non-constitutional interpretation of Maryland law. Petitioner disingenuously tries to convert this into a constitutional issue[2] where none exists because it recognizes that this Court may be looking for a vehicle to answer questions left open in *Coy*. The only constitutional issues raised here were those raised by Mrs. Craig and squarely rejected.

Given that Petitioner is not asking this Court to declare CJP §9-102 unconstitutional or to limit a state court's power to require a trial judges to make case-specific findings and to personally observe and examine child witnesses before allowing a child protective state statute to be utilized, review by this Court is not only unwarranted, it is immaterial. If *certiorari* were granted and this Court disagreed with the Court of Appeals, this Court could decide only that *Coy* rendered CJP §9-102 unconstitutional. And because this Court could not overturn the Court of Appeals finding that Mrs. Craig's trial judge violated CJP §9-102 by failing to personally examine and observe child witness or that the state violated CJP §9-102 by its failure to produce adequate expert testimony, it is immaterial whether this Court agrees concerning that standard.

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[2] Petitioner speciously argues review by this Court is necessary because *Craig* conflicts with *Kentucky v. Stincer*, 482 U.S. 730 (1987). Petitioner of course fails to note that *Stincer* was decided on cross-examination grounds; that the *Stincer* witnesses actually testified live in the defendant's presence at trial and were re-examined on the competency issues; and, that the authors of the sharply worded dissent on face-to-face confrontational grounds have since landed squarely in the *Coy* majority.

Petitioner also cites state court post-*Coy* decisions most of which, like *Craig*, analyzed *Coy* in light of a defendant's constitutional attack on child protective procedures previously upheld as constitutional and, like *Craig* , reaffirmed that constitutionality on state grounds. Interestingly, many states reversed like *Craig* convictions for a failure to meet the state required standard.

Not withstanding Petitioner's hysteria[3] there is nothing to warrant this Court's review. All the Court of Appeals of Maryland did was to say you can take away only as much of a defendant's confrontational rights as is absolutely necessary to enable child witnesses to testify. This result, although decided exclusively on state grounds, is also clearly consistent with *Coy*.[4]

CONCLUSION

Nothing in the Petitioner's argument makes *Craig* worthy of this Court's review. The Court of Appeals of Maryland solely as a matter of state law reversed Mrs. Craig's conviction because the procedures the Court deemed valid to the requisite use of CJP §9-102 were not followed in her case; because the judge did not personally examine and observe the child witnesses demeanor; because the judge did not explore other less confrontationally intrusive means to protect the child witnesses; and because the expert testimony was inadequate to meet the quantum and quality of evidence required under CJP §9-102 and under *Wildermuth*.

A grant of *Certiorari* cannot and will not alter the result below. CJP §9-102 and *Wildermuth* was Maryland law before *Coy*. CJP §9-102, *Wildermuth* and *Craig* are still Maryland law in light of *Coy*. The Petition should be denied.

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[3] *Craig*, far from heralding any retreat from the nationwide move to consider and implement varying protective measures for child witnesses, rather, ensures that the least obstructive measure will be utilized whenever anything less that absolute face-to-face confrontation is employed in a presumptively innocent defendant's criminal trial and approves directly the use of a variety of protective procedures designed to shield a child witness from the impact of testifying in a defendant's presence including both one-way and two-way simultaneously broadcasted closed-circuit television. *Craig* also noted the already existent availability of procedures easily employable to protect a child witness traumatized not by the presence of the defendant but by the sometimes frightening spector of public testimony in a public courtroom.

[4] In no way conceding her already rejected constitutional attack Respondent notes that Petitioner urges review in order "to keep balance true" and loftily quotes Justice Cardoza. Respondent's rights as a presumed innocent accused to subject her accusers to the maximum degree of constitutionally permissible trauma which face-to-face confrontation necessarily entails cannot be compared to the "*gossamer possibilities of prejudice*" created by the exclusion of an accused's physical presence at a jury "view" of a crime scene to which Justice Cardoza refers, writing prior to recognition by this Court of many of the fundamental due process rights we now hold dear in *Snyder v. Massachusetts*, 291 U.S. 97 (1934). *Craig* carefully strikes the balance and keeps that balance true.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of December, 1989, three copies of the foregoing Motion for Leave to Proceed *In Forma Pauperis*, Affidavit in Support Thereof, and Brief in Opposition to the Petition for Writ of Certiorari to the Court of Appeals of Maryland were hand-delivered to Gary E. Bair, Assistant Attorney General, Office of the Attorney General, 7 North Calvert Street, Baltimore, Maryland 21202.

Maria Cristina Gutierrez